Supreme Court, U.S.
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No. 94-814

In The
Supreme Court of the United States
October Term, 1994

IDA DOUGHERTY, et al.

Petitioners,

v.

BRUCE S. MARKS, et al.

and

WILLIAM STINSON, et al.

Respondents.

On Petition for Writ of Certiorari To The
United States Court of Appeals For
The Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. When a federal court finds that the majority members of a city's election board conspired with a candidate of their political party to defeat the other party's candidate through a pervasive scheme of fraudulently and illegally obtaining absentee ballots, in violation of constitutional and statutory rights, does the federal court have the discretion in equity to order the certification of the other candidate as the winner of the election, if it finds, based on a combination of voting machine results, survey data and statistical methods, that the other candidate would have been declared the winner but for the wrongdoing?

2. Is a case moot which raises the issue of whether a federal court may order the certification of the winner of a state election as a remedy for pervasive official fraud, when the state legislature in subsequent proceedings also seated the same candidate, the brief term of the certified winner has ended and the facts of the case are unlikely to be repeated or to escape future review?

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BRIEF IN OPPOSITION

Respondents Bruce S. Marks, Kathy Steck, Manuel Lorenzo, Lydia Colon, Lillian Cruz, Diana Irizarry, Ruth Martinez, Zorida Rodriguez, Yesenia Vasquez and the Republican State Committee respectfully request this Court deny the petition for writ of certiorari seeking review of the Third Circuit's decision in this case.

STATEMENT OF THE CASE

Republican Bruce S. Marks and Democrat William Stinson ran in a special election, conducted on November 2, 1993, to represent Pennsylvania's Second Senatorial District. This election was held to fill the remainder of a term expiring November 30, 1993. According to the certified results of the Philadelphia County Board of Elections ("Board"), of the 38,818 votes cast on the voting machines on election day, 19,691 were cast for Marks, while 19,127 were cast for Stinson. Of the 1,767 absentee ballots cast, Marks received only 371 votes, while Stinson received 1,396 votes. When all votes were added, Stinson won by a final count of 20,523 to 20,062, i.e., by 461 votes. The Board certified Stinson as the winner of the election.

On November 22, 1993 Marks, the Republican State Committee and Kathy Steck filed a complaint in the United States District Court for the Eastern District of Pennsylvania against William Stinson, the William Stinson Campaign, the Board and its Commissioners, Margaret M. Tartaglione, John F. Kane and Alexander Z. Talmadge, Jr. On December 22, 1993, an amended complaint was filed. Seven minority voters joined in the amended complaint, which alleged violations of the Civil Rights Act and the Voting Rights Act.

After four days of hearing on a motion for a preliminary injunction, the district court, on February 17, 1994, issued an opinion finding a pervasive scheme of fraud and wrongdoing by defendants with respect to the obtaining of absentee ballots. It issued a preliminary injunction that: (1) ordered the Board in the future to deliver absentee ballot packages directly to voters, by mail or by hand, and to accept delivery of completed absentee ballots only from the voter in person or by mail, as required by law; (2) ordered the Board to cease discriminatory practices and to distribute absentee ballot materials, at least in the district in question, printed both in Spanish and in English; (3) enjoined Stinson from serving

as state Senator; and (4) ordered the Board to certify the election based on the machine vote total.

Stinson and the Board appealed to the Third Circuit. Petitioners, ten absentee ballot voters in the special election, filed a mandamus petition, which the Third Circuit treated as a motion to intervene and granted. On March 16, 1994, the Third Circuit issued an order and opinion which upheld every provision of the preliminary injunction but one, that ordering the election winner to be certified on the machine vote totals. *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994) (*"Marks I"*).

The Third Circuit instructed the district court as to further proceedings on remand:

> [T]he district court should not direct the certification of a candidate unless it finds, on the basis of record evidence, that the designated candidate would have won the election but for the wrongdoing. See e.g. Curry v. Baker, 802 F.2d 1302 (11th Cir.), stay dismissed, 479 U.S. 1301, cert. [dismissed], 479 U.S. 1023 (1986).

Id. at 889 (footnote omitted). The Third Circuit authorized the district court to certify a candidate as a winner even if a precise count of valid votes could not be made and pointed out how this might be achieved:

> We do not suggest that such a finding would have to be made with mathematical precision. Courts, *with the aid of expert testimony*, have been able to demonstrate that a particular result is worthy of the public's confidence even though not established solely by applying mathematics to the record evidence. See e.g. Curry, 802 F.2d at 1317-19. What is required is evidence and an analysis that

> demonstrate that the district court's remedy is worthy of the confidence of the electorate.

Id. at 889 n.14 (emphasis added).

After remand from the Third Circuit, the final hearing commenced on March 28 and lasted nine days. On April 26, 1994, the district court issued an opinion and order.

In its opinion the district court found that the Board and Stinson —

> engaged in a conspiracy for the purpose of denying hundreds of voters in the Second Senatorial District, specifically Latinos and African-Americans, Bruce Marks, and the Republican party of rights and privileges as set forth in the Constitution and laws of the United States and of the Commonwealth of Pennsylvania. The conspirators intentionally engaged in a plan to promote the Democrat candidate by illegally soliciting and processing absentee ballots to help ensure that William Stinson would receive a plurality of votes in the highly contested Special Election in the Second Senatorial District.

Marks v. Stinson, Civil Action No. 93-6157, 1994 U.S. Dist. LEXIS 5273, (E.D. Pa. Apr. 26, 1994) ("*Marks II*"), slip op. at 67 (conclusion of law 4). The findings of fact establishing this conclusion are summarized below with references to the specific findings, which appear in the district court's opinion reproduced in Appendix B to the Petition For Writ of Certiorari.

Under Pennsylvania law, a qualified elector may vote by absentee ballot if he or she is, *inter alia*, absent from the Commonwealth or county of residence "because his duties, occupation or business require him to be elsewhere during the entire period the polls are open" or is physically unable to go to the polls. 25 P.S. §3146.1(j) and (k). An elector who wishes to vote

by absentee ballot must submit to the appropriate Board an absentee ballot application, including a statement that the elector expects to be out of the county on election day or that the elector is physically unable to go to the polls, with a declaration stating the nature of the disability and the name, address, and telephone number of the attending physician. 25 P.S. §3146.2(a) and (3)(1) and (e)(2). (FF 9-10)

Absentee ballots applications are processed by the Board to determine if the applicant possesses all necessary qualifications. If the Board concludes that the applicant is not qualified, it must immediately notify the applicant. 25 P.S. §3146.2b(d). After approving an absentee ballot application, the Board is required to "mail or deliver" an absentee ballot package to the elector at the address listed on the application. The Board may not deliver it to any other person. 25 P.S. §3146.5. (FF 15, 16, 21, 22)

The elector must mark the ballot "in secret," seal the ballot in an inner envelope, seal the inner envelope in a declaration envelope, and execute the declaration on the declaration envelope. 25 P.S. §3146.6(a). An elector may legally receive assistance in filling out the absentee ballot only if the elector has a physical disability that "renders him unable to see or mark ... the ballot." 25 P.S. §3146.6(a). The elector must "send by mail" or deliver "in person" the executed declaration package to the Board. 25 P.S. §3146.6. If an elector who sent in an absentee ballot becomes able to get to the polls on election day, the absentee ballot is void as a matter of law, and the elector has a duty to go to the polls and void the ballot. 25 P.S. §3146.6(b). (FF 22, 24, 26)

The Stinson campaign sent its workers into areas where a majority of the residents were white to solicit voter registration applications and absentee ballot applications. The goal was to obtain twenty absentee ballot applications from each division. (FF 53) Those who expressed hesitancy to register because they did not wish to go to a polling place were told by campaign workers that they could fill out an absentee ballot application and obtain an

absentee ballot as a matter of convenience. (FF 64) Many improper applications were received based on this misrepresentation. (FF 64) To conceal the fact that many of these improper absentee ballot applications were solicited several months before election day, the Stinson campaign workers told canvassers not to fill in the true date on the application. (FF 54, 66) The applications that the Stinson campaign obtained in this way were then submitted directly to Commissioner Tartaglione's office and over 500 corresponding absentee ballot packages were provided from her office directly to the Stinson campaign. (FF 53-57, 76) Stinson was aware of the improper conduct regarding the absentee ballots, yet he permitted the conduct to continue and even admonished a campaign worker who questioned its legality. (FF 62, 66, 67, 71, 72, 76)

About three weeks before the election, the Stinson campaign learned that a poll showed Marks running ahead of Stinson. (FF 83) The campaign responded by saturating Hispanic and African-American areas of the district with absentee ballot applications using tactics similar to those earlier employed. (FF 84) This time, however, campaign workers soliciting absentee ballot applications told Hispanic and African-American voters that there was a "new way to vote" from the convenience of one's own home. (FF 91) The absentee ballot applications from the minority sections of the district were then delivered by Stinson campaign workers directly to Commissioner Talmadge's office. (FF 83-103, 105, 123-25, 127, 131-32)

The Democrat Commissioners, Tartaglione and Talmadge, and Board employees working with them were aware of the absentee ballot campaign of Stinson and his workers and assisted that campaign by delivering hundreds of absentee ballot packages directly to Stinson workers rather than mailing or delivering them, as required by law, to the electors whose names and addresses appeared on the applications. (FF 50, 143) This assistance was designed to aid the Stinson campaign in obtaining more votes through personal contact between the electors and the Stinson

campaign workers. (FF 97) The Board's assistance to the Stinson campaign was covert and was disclosed neither to Republican Commissioner Kane nor in public meetings. (FF 43, 44, 50, 55-56, 61, 94-97)

After illegally obtaining absentee ballots from the Commission, the Stinson campaign used them in a variety of ways. Stinson campaign workers took the absentee ballots directly to applicants' homes where improper influence was exerted over voters. (FF 98) In numerous instances, Stinson workers executed applications, ballots, and declarations without the voter understanding the nature of the document. (FF 98) In other instances, Stinson workers instructed the voter to check certain places on the ballot, or filled out and forged the ballot. (FF 98) Voters were also assisted in completing applications and declaration packages after the statutory deadline for receipt by the Board had passed, and such ballots were counted by the Board. Many voters who cast absentee ballots testified that they were unaware that they had signed absentee ballot applications. (FF 62, 67, 98, 99, 100)

In one program targeted at minority voters, the Stinson campaign paid its workers $1.00 per absentee ballot that they could obtain for William Stinson. (FF 107) The Stinson campaign thus obtained and delivered to the Board approximately 600 ballots, most, if not all of which, were cast for Stinson. (FF 104-115) In non-minority areas, approximately 450 absentee ballots in favor of Stinson were obtained illegally by the Stinson campaign. (FF 63)

Although the Board cooperated with the Stinson campaign's illegal handling of ballots, there was no evidence that voters relied on representations by the Board in voting by absentee ballot when they were not qualified to do so. Instead, the Board's written instructions on the application and in the absentee ballot package, in Spanish and English, make clear that a voter in the county must go to the polls. There was no evidence to suggest that any voters returned their absentee ballots through party committee persons or Stinson campaign workers based on representations by the Board.

Instead, the written instructions of the Board make clear that a voter must either mail or deliver the completed ballot "in person" to the Board. These instructions are the only published information provided to the public and voters on the absentee ballot process. (FF 22, 134)

In response to the Third Circuit's direction that expert testimony might be of use, three experts in statistics and/or survey research testified at the final hearing: one called by Plaintiffs; one called by Petitioners; and one appointed by the court. The court found the methodology and testimony of each of the three experts independently established to a reasonable degree of scientific certainty that Marks would have won a plurality of the illegal votes cast in the November 1993 special election if the wrongdoing had not occurred and the voters who cast illegal absentee ballots had gone to the polls at the established turn-out ratios. (FF 211) The district court found certification of Marks as the winner of the special election worthy of the confidence of the electorate. (FF 211) These ultimate findings were based on the following findings by the district court with respect to the expert testimony.

A survey of absentee voters in the special election was conducted by workers associated with the Marks campaign shortly after the election. Dr. Brian Sullivan, an expert in econometrics and survey research, reviewed the survey. Dr. Sullivan conducted numerous verifications and statistical adjustments to the survey data. In light of his review procedures, the Court found that the data were reliable. (FF 165-172) Using these data, together with other election statistics, the total illegal absentee ballots cast in the election can be allocated to each candidate. As shown by Dr. Sullivan's method of statistical allocation, Stinson received 1,138 illegal absentee ballots and Marks received 257 illegal absentee ballots. (FF 175-176) This methodology demonstrates that Marks won the election by at least 420 votes. This methodology provides a reliable result since it removed illegal absentee ballot votes from Marks' total, even though the Marks campaign was not engaged in

any illegal conduct, scheme or conspiracy regarding absentee ballots. (FF 177)

These data also support a statistical method to reallocate back to each candidate the number of votes that he would have received but for the wrongdoing of the defendants. (FF 178-182) This "recapture" methodology shows that Marks would have won the election by 416 votes but for the wrongdoing of defendants. It gives the benefit of doubt to Stinson on this issue by, again, removing a certain number of absentee ballot votes from Marks, even though the Marks campaign did not engaged in any illegal conduct regarding absentee ballots. (FF 184) The results determined from the survey data described above are to a degree of statistical reliability that exceeds 99%, based on a determination of standard deviations and statistical confidence levels. (FF 185)

Petitioners' expert, Dr. Paul Shaman, created tables showing, for each of a series of ranges of possible combinations of improper votes, the probability that Marks won the election. (FF 188) Without using some specific data, one cannot select an appropriate range in any of Dr. Shaman's tables. Data, however, exist which can be used with Dr. Shaman's probability tables to determine the probability of a Marks victory. Given that at least 1,000 ballots were illegally delivered to voters by the Stinson campaign and returned to the Board as Stinson votes, the probability of a Marks win is 100% according to Dr. Shaman's tables. This is so even if 30% of the 1,000 ballots are deemed "recaptured" and entirely allocated to Stinson, which would overcompensate him in correcting for the effects of his own wrongdoing. (FF 190) *See also* FF 63 (450 illegal non-minority area ballots) and FF 104-16 (600 illegal minority area ballots).

The analysis of survey research conducted by Plaintiffs' expert, Dr. Sullivan, also provide data that can be used with Dr. Shaman's tables. These data also show a 100% probability of a Marks win. (FF 191-192)

Dr. Orley Ashenfelter, the court-appointed expert, analyzed data on the machine and absentee votes for each candidate in the last twenty-one elections for the state Senate in Philadelphia. Using regression analysis, Dr. Ashenfelter quantified the relationship between absentee votes and machine votes in these elections and compared it to the absentee and machine vote relationship in the November 1993 special election. (FF 199-201) Regression analysis shows that, if the 1993 election had been consistent with the historical relationship between machine and absentee voting, Marks would have received an overall victory margin ranging from 697 to 800 votes. (FF 202-204) The actual difference in absentee votes between the candidates in the 1993 election was more than three standard deviations larger than the expected result. (FF 203) The record establishes one predominant reason for this large difference in 1993 from historically and statistically expected relationships: the pervasive scheme of the defendants to obtain absentee ballots for Stinson through illegal and discriminatory means. (FF 207)

Based on its findings of pervasive election fraud involving the election officials conspiring with the Stinson campaign, the district court, *inter alia*, enjoined the Board from distributing official absentee ballot material to any candidates or their representatives and ordered that absentee ballot packages either be mailed or hand delivered; enjoined the Board from receiving any absentee ballot materials from anyone other than the voter; ordered the Board to maintain all official absentee ballot applications and other ballot materials in its possession for public access; enjoined the Board from delivering or returning such records to any political parties, candidates or their representatives; enjoined the Board from employing discriminatory practices which involve applying the Pennsylvania Election Code or any other law in a manner that favors or disfavors a candidate; and ordered the Board to take all steps necessary to enforce the terms of the district court's order and to comply with the Pennsylvania Election Code and other laws. Based on the unchallenged machine vote count, together with the survey research and statistical projections of the three experts, the

court also ordered the Board to recertify the special election "based on the finding and conclusion that Bruce S. Marks received a PLURALITY of the legally cast votes, or in other words, that Bruce S. Marks would have won the election BUT FOR the wrongdoing."

Petitioners, the Board, Stinson, Talmadge and Tartaglione filed immediate appeals from the district court's permanent injunction. On April 28, 1994, the Third Circuit denied motions for stay but granted motions for expedited appeal. On August 18, 1994, the Third Circuit issued a memorandum opinion and order affirming the district court's April 26, 1994 permanent injunction. *Marks v. Stinson*, Docket Nos. 94-1474, 94-1475, 94-1476, 94-1481 and 94-1482, 1994 U.S. App. LEXIS 28021, (3d Cir. Aug. 19, 1994) ("*Marks III*").

While this federal litigation was ongoing, a proceeding was underway in the Pennsylvania Senate. On January 20, 1994, Marks filed a petition for an election contest with the President *pro tempore* of the Pennsylvania Senate, pursuant to section 1747 of the Pennsylvania Election Code, 25 P.S. §3407, and article II, section 9 of the Pennsylvania Constitution. The petition was referred to the Senate Committee on Rules and Executive Nominations on January 31, 1994. The Committee appointed a subcommittee on the election contest. On February 7, 1994, the subcommittee adopted a pleading schedule. Both Marks and Stinson submitted filings pursuant to the schedule. The subcommittee notified Marks and Stinson on April 26, 1994, that it would hear oral argument on April 27, 1994. Counsel for Stinson did not appeal at oral argument. On April 28, the subcommittee issued a report to the Senate, concluding that Marks would have been the winner of the election in the absence of the extensive wrongdoing perpetrated by the Stinson campaign and the Democrat members of the Philadelphia Board of Elections. On April 28, 1994, the Senate of Pennsylvania adopted a resolution declaring Marks the winner of the November 1993 special election. Pursuant to the resolution,

Marks was administered the oath of office and seated as a member of the Senate on April 28, 1994.

The Senate term which was to be filled in the November 1993 special election ended November 30, 1994. The general election to fill the second district state senatorial seat for a full term (four years) was held November 8, 1994. The four-year term of the winner of that election began December 1, 1994.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The question raised by the petition is moot.

The question Petitioners raise takes issue with that portion of the district court's remedy that ordered the Board to certify Marks as the winner of the special election. That portion of the remedy was specific to the November 8, 1993 special election and the remainder of the term the special election was held to fill.

The Senate of Pennsylvania, pursuant to its constitutional and statutory authority, resolved the election contest filed by Marks in his favor on April 28, 1994. The Senate concluded that Marks was the winner of the special election. No challenge was made to the Senate's determination and Marks served the remainder of the term the special election was held to fill, which ended November 30, 1994.

A new state Senator was elected in the general election held on November 8, 1994 to represent the second district. In accordance with Pennsylvania law, her term as state senator began December 1, 1994.

As a result of these events, the relief Petitioners requested from the district court, a new election or the declaration of a vacancy, cannot be provided. No decision that this Court could make with

respect to the question raised by Petitioners can change either the April 1994 decision of the Pennsylvania Senate or the November 1994 decision of the people. Petitioners have no legally cognizable interest that can be affected by a decision of this Court.

This case does not now present this Court with a live case or controversy and is, therefore, moot. Article III of the United States Constitution does not permit this Court to provide advisory opinions, which is all this Court could give with respect to the question presented.

A similar situation arose in *Hall v. Beals*, 396 U.S. 45 (1969), which involved a class action challenging the Colorado six-month residency requirement for voting. After this Court noted probable jurisdiction of the case, the Colorado legislature reduced the residency requirement from six months to two months and the 1968 election was held. This Court concluded the case was moot because (1) it was impossible to grant the relief that had been sought, (2) the appellants had then satisfied the residency requirement, and (3) most importantly, the six month residency stature was no longer in effect. This Court held: "The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Id.* at 48.

Here, as in *Hall*, it is impossible for the relief requested by the Petitioners in district court to be granted.

The Court also considered in *Hall* whether the case was one which fell within the exception to the mootness doctrine of capable of repetition, yet evading review. It concluded it was not, because the same restriction on voting would not affect the petitioners again and because the state had altered its statutory scheme to the benefit of those who at the next election would be similarly situated to the petitioners.

Here, as in *Hall*, this case is not one that is capable of repetition, yet evading review. This Court, in *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), stated that such an exception to the mootness doctrine, in the absence of a class action —

> was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

This case is not a class action and meets neither of these two requirements.

In the first instance, the district court's order directing the Board to certify the winner of the special election, while evading review here because the term filled by the special election has ended, would easily be reviewable if it occurred after a general election for a full four-year term. And a general election is the situation Petitioners posit to this Court in their Petition.

Furthermore, it is highly unlikely that Petitioners would be subject to the same action again. As noted *supra* in the Statement of the Case, the situations where Pennsylvania law permits voting by absentee ballot, e.g., illness and absence from the county on business, are temporary. For Petitioners to be subject to the same action again would not only require that they again vote by absentee ballot, but also that there be massive fraud in the absentee ballot process and an election that turns on the absentee ballot count. This is not a situation such as was present in *Dunn v. Blumstein*, 405 U.S. 330 (1972), a class action where the complaining class would continue to be subject to the challenged durational residency requirement at the next election and would therefore continue to be disenfranchised.

Although Petitioners here were not disenfranchised, even their own interpretation of the consequences of the case shows that they, at most, suffered a temporary disenfranchisement that did not rise to the level of a constitutional violation of their right to vote. Any disenfranchisement they may have suffered was temporary and ended on November 8, 1994 when they had the opportunity to vote in the general election for state senator for the second district.

Furthermore, even if this issue were not moot, it does not offer this Court a sufficiently robust controversy. Petitioners were intervenors in the case who, at their own choice and insistence, were not aligned with either side of the litigation. None of the losing defendants joined in the petition or filed a petition of their own. The question presented deals with only one aspect of the relief — the portion that directly impacted on the candidates in the special election. Neither candidate has any interest in that relief at this point. A new state senator was elected as the state senator from the second district on November 8, 1994, and her term began on December 1, 1994. This is not the context in which this Court should exercise its authority.

2. The question raised by Petitioners asks this Court to rule on the propriety of a remedy in a unique factual situation; it presents neither an important question of federal law nor a question of federal law that should be settled by this Court.

Petitioners fail to point out certain facts that make this case unique, and they misinterpret the opinions of the district court and the Third Circuit. The election in this case, as noted by Petitioners, was a special state election to fill a vacancy in the Pennsylvania State Senate for state's second senatorial district. However, to understand the situation before the district court and the appropriateness of the remedy provided, further elaboration is essential.

Petitioners' assertion that the district court did not make a finding as to the actual number of illegal absentee votes ignores findings of fact nos. 63 and 114. In finding of fact no. 63, the district court found that approximately 450 absentee ballots were returned to the Stinson campaign and delivered to the Board from the non-minority areas of the district, in violation of Pennsylvania law. In finding of fact no. 114, the district court found that over 600 absentee ballots were returned to the Stinson campaign and delivered to the Board from the minority areas of the district. This totals to over 1,050 illegal absentee votes. The numbers of illegal absentee votes predicted by expert witnesses Drs. Ashenfelter and Sullivan are consistent with this number. Dr. Ashenfelter estimated illegal absentee votes in the range of 1,158 to 1,261 and Dr. Sullivan projected 1,395. Also, using the district court's number of illegal absentee votes with the probability tables of Petitioners' own expert Dr. Shaman shows a 100% probability that Marks would have won the special election but for wrongdoing.

Petitioners assert the Third Circuit concluded in its decision on the appeals from the district court's preliminary injunction, *Marks I*, that Petitioners had been "unconstitutionally disenfranchised by the district court" when the district court ordered the winner of the election to be certified based solely on the voting machine tally. This is incorrect. The Third Circuit did not conclude that Petitioners nor any other absentee voter had been unconstitutionally disenfranchised. Nor, based on Third Circuit precedent, could the Third Circuit have done that.

The Third Circuit instructed the district court that it had to consider how many absentee voters would have gone to the polls but for the misconduct and what impact that would have had on the results of the election. *See Marks I.* While the Third Circuit mentioned disenfranchisement of the absentee voters, such disenfranchisement would only last until the next election. Under Third Circuit precedent, such temporary disenfranchisement does not rise to the level of a constitutional violation. *See Donatelli v. Mitchell*, 2 F.3d 508 (3d Cir. 1993) (no substantial denial of

fundamental right to vote where state senator is assigned to constituency which did not elect him).

Petitioners also did not inform this Court of the proceeding that took place in the Pennsylvania Senate. As set forth *supra* in the Statement of the Case, Marks, in accordance with Pennsylvania constitutional and statutory law, filed an election contest with the state Senate on January 20, 1994. On April 28, 1994, the state Senate reached a decision consistent with that of the district court, i.e., that but for the wrongdoing Marks would have won the special election, and had Marks sworn in as the state Senator from the second district.

When these missing facts are supplied and the misinterpretations of the underlying district court and Third Circuit decisions are corrected, it is apparent that this is a unique fact situation. It is also apparent that, in light of the gross and pervasive official misconduct, the remedy is appropriate. The district court did not appoint Marks state senator, the voters of the second district elected him. The court removed the obstacles to his seating that the conspirators erected.

Another fact not pointed out by Petitioners that sheds light on the unimportance of the question presented is that the Third Circuit decision, *Marks III*, which affirms the district court's final injunction order and is the decision supporting the judgment Petitioners seek to have reviewed, is an unpublished memorandum decision. Under the Third Circuit's Internal Operating Procedures, §5.1.2, its memorandum opinions have no precedential value.

A case that is not precedential does not present the important federal question that Petitioners argue exists. This case presents a unique fact situation that is unlikely to occur again. It does not present an important federal question which this Court should consider.

CONCLUSION

For the foregoing reasons, the question presented by Petitioners does not present a certiorari worthy question and the Petition for Writ of Certiorari should be denied.

December 6, 1994

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